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MICHAEL RODAK, JR

No. 80-49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,

Appellants,

v.

STAR COAL COMPANY,

Appellee.

On Appeal From the United States District Court For The Southern District of Iowa

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee, Star Coal Company, respectfully moves the Court pursuant to Rule 16 to affirm the judgment of the United States District Court for the Southern District of Iowa upon the ground that the decision and judgment of the trial court is judicially correct, and the questions presented by Appellants are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The Appellants' Jurisdictional Statement fully sets forth the decision of the trial court below, the basis for

jurisdiction and the questions presented in this appeal. They will not be repeated.

REASONS FOR AFFIRMANCE

1

THE DISTRICT COURT PROPERLY RULED THAT SECTION 518 WHICH REQUIRES A MINE OPERATOR CHARGED WITH A VIOLATION OF THE ACT TO PURCHASE DUE PROCESS BY PREPAYING THE PROPOSED CIVIL PENALTY IN ORDER TO OBTAIN A HEARING IS UNCONSTITUTIONAL AND ENJOINED ITS ENFORCEMENT.

The evidence adduced at the hearing shows that Star Coal Company has an excellent past record of reclamation and environmental protection and that if all coal miners in the past had shared Star Coal Company's concern for the environment, Congress might not have deemed it necessary to enact a thoroughly regulatory law as the Surface Mining Act. (Jurisdictional Statement, p. 24a). The Court found that there would be no adverse effects to the public nor to the environment if enforcement of the provisions requiring prepayment of civil penalties into escrow as a condition of gaining a hearing were preliminarily enjoined.

The inspectors at Star Coal Company made subjective decisions concerning the risk of harm to the employees operating in the pit area, and under circumstances where reasonable men would certainly differ. In 35 years of experience using explosives, not one single injury had occurred. §701(8) of the Act defines the threat of "imminent danger to the health and safety of the public" as the existence of conditions that could:

> "reasonably be expected to cause substantial physical harm to persons outside the permit area before such conditions, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected

> to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for the abatement."

30 U.S.C. §1291(8). The definition of "significant, imminent environmental harm to land, air, or water resources," codified in 30 C.F.R. §700.5, speaks in terms of "adverse impact" which may be "reasonably expected to cause harm before the end of the abatement period." These standards appear to be well designed to protect the public and the environment, but leave the ultimate decision up to the individual inspector who must use his judgment, based on his concepts of the function of the Act, to decide whether an operation should be shut down. Government field inspectors do not necessarily have the ideals and standards to which persons in positions of great power and responsibility should subscribe. The question of whether due process will be afforded to the affected parties should not be approached from the angle that the officials in charge will bend over backwards to protect these parties, but rather should be viewed from the perspective of preventing people from abusing the process. This harsh censure is the result of the abuses to which this system has already been put.

Section 518 of the Act, 30 U.S.C. §1268, provides for civil and criminal penalties. It reads in relevant part:

> "[A]ny permittee who violates any permit condition or who violates any other provision of this subchapter, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a *cessation order* under section 1271 of this title [§521 of the Act], the *civil penalty shall be assessed.*"

The penalties that may be assessed are exceedingly harsh, providing for an assessment up to Five Thousand Dollars ($5000) for each violation and for each day of continuing violation to be deemed a separate violation within the discretion of the Secretary. If a cessation order

under §521 is issued, the Secretary is compelled to impose civil penalties. Section 518(c) further provides that the failure to pay the penalty will result in a waiver of all legal rights to contest the violation of penalty amount. 30 U.S.C. §1268(c). Section 518(e) is the criminal portion of the penalty provisions and provides that if an operator fails to comply with the cessation order entered under §521, he is subject to be fined not more than Ten Thousand Dollars ($10,000) and sentenced to prison for not more than one year or both. 30 U.S.C. §1268(e).

Reading the relevant sections of the Act together, it is apparent that a cessation order can be given by an inspector in the field without any hearing. This then leads to the mandatory assessment of a civil penalty; before the expiration of the thirty days in which an operator is entitled to a hearing, he may be subject to civil penalties in the amount of One Hundred Fifty Thousand Dollars ($150,000.00), without having had a hearing of any kind.

The power of the appointed officials of the Office of Surface Mining to close down Appellee's legitimate business purely at their whim creates a condition where the power to regulate is also the power to destroy. Appellee's due process guarantees under the Fifth Amendment have greatly suffered.

The question of the degree of due process required is determined by looking to three factors this Court set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975):

> "First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved in the fiscal and administrative burdens that the additional or substitute requirements would entail."

While the private interests are pecuniary in nature, there is a substantial likelihood of irreparable harm if the implemented procedures are followed. The margin of success in a small surface coal mining operation is often narrow. The halting of such an operation for even a day may lead to its economic collapse. On the other hand, there is a strong public interest in allowing the issuance of cessation orders when there is imminent danger to the health or safety of the public or when there is threat of significant imminent environmental harm to land, air, or water resources. There is no reason, however, why a matter of this kind cannot be presented for a temporary restraining order before a United States District Court Judge, a Federal Magistrate, or an Administrative Law Judge within two hours' notice.

The requirements of due process are not fulfilled by the current standards of the Act, under which summary administrative justice is meted out and the administrative review procedures do little to fill the void to afford Appellee any relief from suffering from operation of a cessation order or heavy penalties accompanying violation notices.

The "refund with interest" provision does not adequately protect mine operators for three reasons. First, it ties up needed capital, which is not cured by the Secretary's regulation providing for a "conference" before the proposed penalty must be paid into escrow. The hearing is before the prosecutor, who alleged that there was a violation in the first instance. Secondly, the interest recoverable is substantially below the prime rate, and in light of the fact that penalties may require several years to litigate to conclusion, the mine operator is economically coerced to give up his right to contest the violation and the amount. Thirdly, there is no provision for payment of reasonable attorney fees in the event the coal company is successful in recovering money which should not have been placed in escrow in the first place. Unlike award of

attorney fees authorized in other civil rights cases, there is no such provision for any potential abuse of process in the Surface Mining Act. This leaves the mine operator with an option to suffer a loss of his property without due process by abandoning his right to contest, or to expend more money than the penalty on attorney fees to get it back. The tool selected to pressure mine operators to make unwarranted penalty payments in order to continue their operations clearly violates procedural due process guarantees.

In *Fuentes v. Shevin*, 407 US 67 (1972), the Court said, pp. 570 and 571:

> "...If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. *But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.* 'This Court has not...embraced the general proposition that a wrong may be done if it can be undone.'..." (Emphasis added).

The requirement of prepayment of penalties or face the threat of continued daily monetary losses if the miner does not discontinue the alleged violation has the same effect as a cessation order, and constitutes a violation of the Due Process Clause.

CONCLUSION

The District Court's decision and judgment is correct in all respects and should be affirmed.

Respectfully submitted,

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